Brief of Hopkins & Sargent for P. C.

Filed October 7, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

CENTRAL NATIONAL BANK OF BOSTON ET AL.,
Plaintiffs in Error,
v.
AARON R. STEVENS ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR CENTRAL NATIONAL BANK.

W. S. B. HOPKINS,
WM. A. SARGENT,
for Central National Bank.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 38.

THE CENTRAL NATIONAL BANK OF BOSTON AND OTHERS (holders of certificates issued by JOHN W. VAN VALKENBURGH as Receiver of the Lebanon Springs Railroad Company), *Plaintiffs in Error*,

AGAINST

AARON R. STEVENS AND OTHERS, *Defendants in Error.*

BRIEF OF THE CENTRAL NATIONAL BANK, Plaintiff in Error.

Statement of the Case.

This case comes before this court on writ of error to the Court of Appeals of the state of New York, which rendered a judgment affirming a judgment rendered November 10, 1891, by the Supreme Court of the state of New York in favor of Aaron R. Stevens and others, plaintiffs below, defendants in error here, who were holders of bonds issued by the Lebanon Springs Railroad Company, dated July 1, 1867.

The plaintiffs in error were holders of receiver's certificates issued on the Lebanon Springs Railroad, dated

April 2, 1881, and the controversy here is between the plaintiffs in error claiming a lien upon the Lebanon Springs Railroad for the amount of said receiver's certificates under an order of the New York Supreme Court, and claiming a lien on said railroad for said amount, and the right to obtain judgment against Foster and Hazard, defendants in error herein, for any deficiency in said amount, under a decree of the Circuit Court of the United States for the Northern District of New York, dated March 24, 1887, on the one hand, and bondholders of the Lebanon Springs Railroad claiming a lien upon said railroad, on the other hand.

The judgment of the New York Supreme Court dated November 10, 1891, among other things enjoins the owners of the receiver's certificates, and, among others, the Central National Bank, from proceeding with the sale of the Lebanon Springs Railroad under the decree of the United States Circuit Court, and from suffering the sale to proceed, thereby preventing the rendering of any deficiency judgment in the United States court against said Foster and Hazard.

The Central National Bank claims that there is error in the state court judgment dated November 10, 1891, in that it enjoins the enforcement of the United States court decree dated March 24, 1887.

This action was originally brought in 1887, notice of pendency being filed October 10, 1887, by Aaron R. Stevens, but other parties were brought in with him as co-plaintiffs as owners of Lebanon Springs bonds dated July 1, 1867. (See Fifth Amended Complaint, Record, pp. 2, 87.)

The defendants were all parties in interest, including —

1. The Union Trust Company, the trustee under the bonds dated July 1, 1867.

2. The purchaser who bought at the foreclosure sale in 1872, and his clerk, the grantee at the foreclosure sale.

3. The New York, Boston & Montreal Railroad Company, its receiver, and the trustees of its mortgages.

4. The certificate holders (plaintiffs in error here).

5. Foster and Hazard, the purchasers at the sale in the Sackett suit, and the Lebanon Springs Railroad Company.

In the complaint are prayers (Record, p. 23) that the owners of all the bonds issued by the Lebanon Springs Railroad Company be adjudged to have a first lien on the railroad; that the judgments in the foreclosure suits (hereinafter referred to) be specifically enforced; for a sale; and that it be adjudged that the certificates issued by Receiver Van Valkenburgh were beyond the power of the court to issue, and are of no validity except to bind the interest represented by the bonds in the suit; and that all defendants be enjoined from interfering with the property; for a receiver, and for general relief.

The Central National Bank answered (Record, p. 24), setting up the United States Circuit Court decree (Record, schedule C, pp. 34–37).

Upon the first trial of this action in the state court, judgment was rendered dismissing it on its merits; on appeal that judgment was reversed by the general term and a new trial ordered.

See Opinion, *Stevens* v. *Central Nat. Bank*, 57 Hun, 498.

At the new trial the judgment of November 10, 1891,

was rendered, and affirmed upon appeal, and is now before this court for review.

The decree of the United States Circuit Court was rendered March 24, 1887, in a suit brought by the Central National Bank in behalf of the certificate holders to enforce payment of the certificates against Hazard and Foster, the purchasers at the sale in the Sackett suit, the New York, Rutland & Montreal Railway Company, their grantee, and the American Loan & Trust Company, mortgagee. This decree is fully set forth in the record at page 34. It decreed, —

1. That the receiver's certificates dated April 2, 1881, were a lien upon the railroad "in the hands of the defendants herein, and of any persons claiming through or under the defendants, Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property at a sale thereof made under and in pursuance of the judgment rendered in said action [Sackett suit] in said Supreme Court [of New York] on or about the 12th day of January, 1885."

2. That the Central National Bank of Boston held $250,000 in amount of said certificates, on which there was due said sum of $250,000, and interest at six per cent from January 1, 1886.

3. A reference to William Lansing, master, to report who other than the Central Bank were the holders of certificates.

4. A sale of the railroad by Frothingham, referee.

5. Made a decree over against Foster and Hazard for any deficiency between the proceeds of sale and the amount due on the receiver's certificates.

Under this decree, advertisement was made May 19, 1889, of a sale of the property. (Record, p. 462.)

The adjudicating part of the judgment of the state court dated November 10, 1891 (for copy see Record, p. 112), adjudged, among other things, —

1. That all owners of any of the certificates hereinbefore described as issued by the receiver Van Valkenburgh, and each of them, and their and each of their officers, agents, servants, and attorneys, are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffering any such action or proceeding to be brought or to be prosecuted or to be proceeded with in the names of any of them.

2. That the judgment in the Sackett suit (hereinafter described), and the sale and referee's deed to Foster and Hazard, be reviewed and reversed, vacated, and set aside.

3. That the Central Bank and other certificate holders, and each of them, and their and each of their officers, agents, servants, and attorneys, be perpetually enjoined from proceeding with the sale under the decree (of the United States Circuit Court dated March 24, 1887) in the Central Bank suit, and from suffering the said sale to proceed in their or any of their names or behalf.

4. That the judgment and decree of 1872 (hereinafter described) be now enforced.

5. That the road be sold by John L. Henning, referee.

6. That the referee, out of the proceeds of sale, pay to the holders of Lebanon Springs bonds the amount found

due thereon, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy them, and the balance to the holders of such bonds.

The following facts appear in the findings of fact (Record, pp. 88–110) :—

The Lebanon Springs Railroad Company was organized under the laws of New York in 1852, and became the owner of property described in the decision and judgment (pp. 88–92).

On July 1, 1867, it issued and sold its bonds to the amount of $2,000,000 (pp. 92, 295, 492).

To secure these bonds it executed and delivered to the Union Trust Company of New York its mortgage upon all its property (pp. 92, 492).

Default was made in the payment of interest upon these bonds, and by reason thereof the principal sum secured by the mortgage became due January 1, 1870. (Sixth finding, p. 492.)

In January, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington & Rutland Railroad Company, and one company was thereby formed under the name of the Harlem Extension Railroad Company (pp. 93, 94). This company also executed bonds to the amount of $4,000,000, of which only $1,500,000 were issued, secured by mortgage to the Union Trust Company on the same property (p. 94).

No interest was paid upon said bonds, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company, after January 1, 1870. (Ninth finding, p. 493.)

The Union Trust Company commenced an action to foreclose said first mortgage February 22, 1872, in the Supreme Court of New York, making the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan, and James B. Hodgkins defendants, in which judgment of foreclosure and sale was duly rendered December 10, 1872 (see copy judgment, pp. 96–98), and under said judgment all the powers, rights, and franchises therein described were sold January 25, 1873, by Charles S. Fairchild, referee, to William Butler Duncan for the sum of $100,000. (Tenth finding, p. 493.)

On the same day, by direction of Duncan, the said premises were conveyed by said referee to James C. Hull, the clerk of Duncan, by deed duly recorded. (Eleventh finding, p. 493.) Defendant Hull paid no consideration for the conveyance to him (p. 503).

No part of said purchase price of $100,000 was ever paid by Duncan or Hull or any other person, except the plaintiff's taxable costs and the referee's fees on foreclosure, paid by some one. (Twelfth finding, p. 493.)

About the same time the Union Trust Company commenced an action in Vermont against the Harlem Extension Railroad Company and the Lebanon Springs Railroad Company to foreclose said mortgage, which proceeded to decree of sale December 6, 1872. (See decree, pp. 98–100.) Daniel McEowen was appointed special master to make such sale, and sold the property of said companies in Vermont to Trenor W. Park for the sum of $25,000, and, by direction of Park, executed and delivered a deed of said property to Charles G. Lincoln, which was duly recorded in Vermont. No part of said $25,000 was ever

paid by Park or Lincoln or any other person. (Thirteenth finding, pp. 493, 494.)

No consideration was paid by defendant Lincoln for said deed (p. 503), none of the bondholders of the Lebanon Springs Railroad Company, except, perhaps, Duncan and Park, had any knowledge or information of said conveyances to Hull and Lincoln, or of the non-compliance with the terms and conditions of the sale and the non-payment of the purchase money, or of any of the subsequent acts or transactions with respect to the property, until about the time of the commencement of an action in 1880 in the New York Supreme Court, in which Marvin Sackett was plaintiff, and Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston & Montreal Railway Company, and Daniel Butterfield as receiver of the last-named company, were defendants. (Fourteenth finding, p. 494.) This action will be hereafter called "the Sackett suit." January 28, 1873, Hull and Lincoln, without consideration, made a bond to Duncan and Park for $5,000,000, secured by mortgage on the property conveyed to Hull and Lincoln (pp. 503, 504).

January 30, 1873, Hull and his wife conveyed the premises conveyed to him by Fairchild, referee, to the New York, Boston & Montreal Railroad Company for the nominal consideration of five dollars, which deed was duly recorded. (Sixteenth finding, p. 494.)

Afterwards Lincoln conveyed the premises, rights, and franchises conveyed to him by the special master in Vermont to the same company for a like nominal consideration, and his deed was duly recorded in Vermont. (Seventeenth finding, pp. 494, 495.) Said conveyances by Hull and Lincoln were made subject to the Duncan and Park mortgage for $5,000,000.

Afterwards the New York, Boston & Montreal Railroad Company became utterly insolvent, and Daniel Butterfield was appointed by this court receiver. (Eighteenth finding, p. 495.)

Neither the New York, Boston & Montreal Railroad Company nor said Butterfield ever took possession or used or occupied the said Lebanon Springs Railroad or any of its franchises, or claimed any right thereto, and never paid any consideration for said pretended transfer, but abandoned the same, and, although said receiver was made a party defendant in the Sackett suit, he made no claim to any right or property therein, and judgment by default was entered against him. (Nineteenth finding, p. 495.)

From about the time of the insolvency and the appointment of a receiver of the New York, Boston & Montreal Railway Company, and after its abandonment by the said company and its receiver, down to the commencement of the Sackett suit, the said road, its property and franchises, had been used and occupied by persons having no right or authority so to do. The last two occupants were Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company, defendants in the Sackett suit. Neither of said last-named parties ever had or claimed to have any authority or right to use or occupy the said railroad or its property. (Twentieth finding, p. 495.)

The Sackett suit was commenced at the request and with the concurrence of holders of Lebanon Springs Railroad Company bonds, owning bonds amounting to about $1,200,000 at their face value, and counsel retained, acting for such bondholders to the amount of about $1,200,000, drew the original complaint in said action, at the request and with the concurrence of said bondholders, including Sackett. (Twenty-second finding, pp. 495, 496.)

In the Sackett suit, John W. Van Valkenburgh was, October 1, 1880, appointed receiver of the Lebanon Springs Railroad Company, and, in November, 1880, qualified as such. (Thirtieth finding, p. 498. See order appointing receiver, pp. 206–209; certificate of filing security, pp. 209, 210.)

Said Van Valkenburgh took possession of the property of the Lebanon Springs Railroad Company, and continued to operate said railroad as such receiver until the appointment of his successor. (Thirty-third finding, p. 499.)

Upon his appointment, the receiver found that there was no rolling stock or means of operating the road or making necessary repairs, and thereupon, to relieve the immediate pressing necessity, the court ordered the issue of $25,000 par value of receiver's certificates, and afterwards, upon the further representations of the receiver of the condition of the road and its wants, an engineer expert was appointed by the court to examine into the condition of the road. Upon that report being presented, it appearing that a larger sum of money was necessary to preserve and protect the property and keep it running, the court ordered the issue of $350,000 face value certificates, $25,000 to be used to repay the first $25,000, and the other $325,000 to be used for the necessary wants of the road and its preservation. The order so made was the same as Exhibit A annexed to the answer of the Central National Bank, and was dated April 2, 1881. (See order, pp. 31, 32; Thirty-fourth finding, pp. 499, 500.)

Certificates of indebtedness, amounting in the aggregate to $350,000, were issued and negotiated by the receiver pursuant to said order. These certificates were in the form of Exhibit B annexed to the answer of the Central National Bank. (See pp. 33, 34; Thirty-fifth finding, p. 500.)

The Central National Bank became the purchaser for value of said receiver's certificates to the amount of $250,000, which it still holds and owns. (Thirty-sixth finding, p. 500.)

After the trial in the Sackett suit the court filed its decision, dated December 13, 1884, by which it found substantially the facts stated in the findings found at the request of the plaintiffs in error, from the first to the nineteenth, inclusive, except the seventeenth finding of fact, and also found, as conclusion of law, that the purchase by Duncan was for the benefit of the bondholders of the Lebanon Springs Railroad Company, and vested the right to a title in them; that the conveyance by the referee to Hull, in accordance with the directions of Duncan, merely vested the title in Hull as trustee for the bondholders; that the conveyance by Hull and wife to the New York, Boston & Montreal Railway Company was wholly ineffectual to pass any title to said company, or to divest the bondholders of any title therein, and that the title to and beneficial interest in the railway company, its rights and franchises, continued to be, and still was, in the bondholders of the Lebanon Springs Railroad Company, and that the property and franchises and powers of said company as described in the mortgage to the Union Trust Company, and all of the right, title, and interest of all the parties to the action, be sold at public auction, and that all parties be barred and foreclosed of all right, title, and interest in said property; that a referee be appointed to make such sale, and that, in the decree or judgment to be entered in the action, such clause or clauses should be inserted therein as in the judgment of the court might be necessary to protect holders of receiver's certificates. Judgment in said action was rendered January 12, 1885, and filed in the Rensselaer county

clerk's office. A copy of the judgment is annexed to the answer of defendants, Royal E. Robbins and others, marked "Exhibit A," except that the judgment contained a full description of the mortgaged premises described in the complaint in this action. (See Exhibit A, pp. 51–53; Thirty-eighth finding, pp. 500, 501.)

Under the judgment in the Sackett suit, the railroad and property of the Lebanon Springs Railroad Company was sold, January 12, 1885, to defendants Foster and Hazard, for $155,000, which was paid by them, and the usual referee's deed of the said railroad and property was made and delivered to them, and they were put in possession of said railroad and property, and remained so in possession until they delivered possession of the same to defendant, the New York, Rutland & Montreal Railway Company, and, by orders of the court, said receivership was terminated and the receiver discharged. (See allegation in the complaint, par. 25, p. 21, admitted by the answer of plaintiffs in error, par. 12, p. 25.) (Record, pp. 21, 25.)

Out of the said sum of $155,000, the purchase price of said premises, paid by Hazard and Foster, the interest due and unpaid upon the receiver's certificates held by the Central National Bank, the Massachusetts Mutual Life Insurance Company, and the receiver of the property of the Pacific National Bank, was paid, and the balance of the purchase money was used and applied as directed by the judgment in the Sackett suit. (Forty-fifth finding, pp. 502, 503.)

When the principal of said certificates became due, April 1, 1886, it was not paid, and thereupon the defendant, the Central National Bank of Boston, brought an action in the New York Supreme Court in behalf of itself, as well as other holders of receiver's certificates similarly situ-

ated, against Hazard and Foster, the New York, Rutland & Montreal Railway Company, and the American Loan & Trust Company as defendants.

For complaint in that suit see Record, pp. 469–474. The complaint, among other things, set up the order dated April 2, 1881, in the Sackett suit made by the New York Supreme Court, authorizing the issue and negotiation of receiver's certificates to the amount of $350,000, making the same a first lien on the road, and providing that, in case said railroad property at any sale thereof should not bring enough to pay the receiver's certificates in full, the purchaser should assume as a first lien thereon the balance of said principal and interest of said receiver's certificates; that the certificates were issued and negotiated; that a judgment was rendered January 12, 1885, by which it was adjudged, among other things, that said certificates were ratified and confirmed, and declared to be a first lien on the road, and providing for a sale of the road subject to the payment of the undue principal and interest of said receiver's certificates, and that the purchaser should take said property subject to the receiver's certificates, and should assume, as part of the consideration of the purchase, the payment thereof; that the referee, on June 12, 1885, sold the premises to defendants William Foster, Jr., and Rowland N. Hazard, and that Foster, acting for himself and Hazard, and the referee, signed a contract of sale whereby, among other things, Foster, acting for himself and Hazard, assumed and agreed to pay the unpaid principal and interest of said receiver's certificates as part of the consideration for such purchase; that the principal of the receiver's certificates became due April 2, 1886, and certificates held by the plaintiff to the amount of $250,000 were duly presented for payment, and payment refused; that the defendants, or some of them,

were in possession of the railroad property, describing it, and that they had some claim thereon subsequent to the lien of the certificates.

The complaint prays that the certificates be adjudged a lien on the premises, asks for a foreclosure, a receiver, and sale, and for payment of the certificates out of the proceeds of sale, and that defendants Hazard and Foster may be adjudged to pay any deficiency after applying the proceeds of sale to the payment of principal and interest of said certificates.

The defendants all answered. After issue was joined, the action was removed by the defendants therein into the Circuit Court of the United States for the Northern District of New York. After such removal, testimony was taken in behalf of all parties, and the suit finally brought to a hearing, and a decision and decree made therein, of which a copy is annexed to the answer of the defendant the Central National Bank, marked C. (See pp. 34–37.) In pursuance of said decree of the United States Circuit Court, the referee named therein, on May 19, 1889, advertised the property for sale, being the same premises described in the complaint in this action. (Forty-sixth finding, p. 503; Record, p. 462.)

Since the rendering of said decree in the United States Circuit Court, the defendants, certificate holders (plaintiffs in error) have duly appeared before the master *pro hac vice*, appointed by the decree, produced their certificates, and made proof of their title thereto and the amount due thereon. (Forty-seventh finding, p. 503.)

It appears by the record that a motion was made in the Court of Appeals, stipulated to be heard with the appeal, on behalf of the plaintiffs, and of Edward Winslow Paige as attorney for the Lebanon Springs Railroad Company,

for the dismissal of the appeal and the affirmance of the judgment (p. 519), such motion being based upon a resolution purporting to be passed by the directors of the Lebanon Springs Railroad Company, and upon a deed dated April 25, 1892, to William Foster, Jr., executed by the referee mentioned in the decree in the United States Circuit Court suit, and upon other deeds. (Record, pp. 520–527.)

Upon this motion an affidavit was filed by Alpheus T. Bulkeley, an attorney for the Central National Bank, alleging that, after the judgment of November 10, 1891, defendant Foster brought an action in the New York Supreme Court against the Central Bank and others, based upon the judgment of November 10, 1891, to set aside that portion of the United States court decree of March 24, 1887, adjudging that Foster, either alone or with Hazard, pay the Central Bank and other certificate holders the deficiency that might exist in the payment of the certificates after the application of the proceeds of the sale of the road, and to annul and enjoin the decree that execution issue for such deficiency; that Judge PUTNAM granted a temporary injunction; that said suit was then removed to the United States Circuit Court by the Central Bank, and the Circuit Court vacated Judge PUTNAM's injunction, and said suit is now pending; that the Central Bank set up as a defence the United States court decree of March 24, 1887; that Foster's counsel claims that the sale made by the United States court March 23, 1892, is void as made in violation of the state court judgment of November 10, 1891, and that the Central Bank had no right to take out execution, said right depending upon a legal and valid sale. (Record, pp. 528, 530.)

It does not appear that this motion was ever decided by the Court of Appeals.

When the state court judgment dated November 10, 1891, was rendered, the referee appointed by the decree of the Circuit Court of the United States was still advertising the premises for sale under that decree. Application was made on behalf of Peter Butler as receiver of the Pacific National Bank, the holder of some receiver's certificates, to the Circuit Court of the United States for an order requiring the said referee to proceed with the sale notwithstanding the injunction contained in the judgment of the New York Supreme Court. This motion was granted by Judge WALLACE.

See Opinion, 49 Fed. Rep. 293.

Afterwards the premises were sold, March 23, 1892, by the referee appointed by the United States Circuit Court decree, and deeded to William Foster, Jr., for $7500. (See deed, pp. 525–527.)

Foster also purchased under the judgment of the New York Supreme Court in this action, and received a deed dated May 16, 1892 (p. 524).

It appears from the findings of fact (Record, p. 110) that the court found that the suit of *Sackett* v. *Root* was neither brought nor conducted for the purpose of realizing the property to the owners of said Lebanon Springs bonds, and that it was brought and conducted for the purpose of realizing out of the property certain individual claims of said Sackett and Tilden in preference of and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property, and were behind the mortgage.

The Court of Appeals bases its affirmance of the judgment of November 10, 1891, on two grounds:

1. That the Sackett suit was not a representative suit, for lack of parties, the trustee under the mortgage not having been joined.

2. On the ground of fraud in that certain individual claims of Sackett and one Tilden were paid out of the proceeds of the receiver's certificates. (See Opinion, Record, p. 537.)

Assignment of Errors.

The following are the errors assigned by the plaintiffs in error which will be insisted upon in this argument: —

1. That the court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., the New York, Rutland & Montreal Railway Company, and the American Loan & Trust Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said court also erred in perpetually enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said court also erred in enjoining and restraining all owners of any of the certificates described in said judgment as issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants, and attorneys, from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises, and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

4. The said court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said court also erred in providing in the said judgment that the said referee therein named, ascertain, determine, and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained, and determined by the said

Circuit Court of the United States in and under the decree of the said Circuit Court of the United States above referred to.

6. The court below also erred in that by its judgment it required the holders of the said certificates, including the plaintiffs in error, to produce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon; whereas the said facts as to the title to said certificates and as to the amount due thereon had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The court below also erred in refusing to find, as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Valkenburgh as receiver, and held by the defendants the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and the other persons who have appeared before the master *pro hac vice*, and produced their certificates, are, as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint, as adjudged by the Circuit Court of the United States by its decree in the suit of Central National Bank of Boston *v.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the master *pro*

hac vice named in said decree, and as reported by said master.

8. The court also erred in refusing to find, as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant, the Central National Bank of Boston, and the other defendants, holders of receiver's certificates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the state of New York as in any way impairs the rights of the plaintiffs in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains, or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact decided the contrary to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the state of New York. (See Assignment of Errors, Record, pp. 543–546.)

Brief of Argument in behalf of Central National Bank, Plaintiff in Error.

I.

This case presents federal questions.

The assignments of error clearly present federal questions in that the state court did not give due validity and effect to the United States court decree dated March 24, 1887, in that the state court perpetually enjoined the plaintiffs in error from proceeding with the sale under said decree, and in that the state court enjoined the certificate owners from proceeding with any action to enforce any lien upon, or the sale of, the property in question, and from suffering any such action or proceeding to be prosecuted or proceeded with in the names of any of them, thereby preventing the rendering of a deficiency judgment against Foster and Hazard in the United States Circuit Court under said decree.

I. The decision of the state court refuses to give due effect to a judgment or decree of a United States court.

This is a federal question within the jurisdiction of the United States Supreme Court on a writ of error to the highest court of the state. (*Crescent Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141.)

As was said by Mr. Justice BRADLEY, in delivering the opinion of this Court, —

> "Where a state court refuses to give effect to the judgment of a court of the United States, rendered

upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the state courts. (*Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Embry* v. *Palmer*, 107 U.S. 3; *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141.)"

2. In this case the JUDGMENT of the state court as rendered, directly and expressly attempts to nullify a DECREE of the United States Circuit Court.

(1) The DECREE of the United States Circuit Court declares the receiver's certificates to be a lien upon the premises and property described in the complaint in the hands of the defendants in that suit or of any persons claiming under them. The JUDGMENT in this suit attempts to defeat the said lien and subordinate it to the rights of others.

(2) The referee named in said DECREE of the Circuit Court is directed to give public notice of sale and to sell the premises described in the decree, which are the same

as the premises described in the complaint in this action. The JUDGMENT in this case perpetually enjoins the certificate holders from proceeding with the sale, and "from suffering said sale to proceed in their or any of their names or behalf."

(3) The DECREE in the Circuit Court provides that, in case of any deficiency, the defendants Hazard and Foster shall pay to the complainant and the other certificate holders the residue of the indebtedness on said certificates remaining unsatisfied *after the sale* of said property. The JUDGMENT in this case deprives us of the benefit of that part of the decree by perpetually enjoining a sale, and thus defeating the personal decree against Foster and Hazard.

(4) The United States Circuit Court DECREE, as against all the parties to that suit, takes possession of the property and premises described therein for the purposes of such decree. They were until the sale under said decree, as against those parties and for the purpose of that suit, in the possession and under the control of the United States Circuit Court. This possession is good as against the world. It is a complete defence to any claim made in a state court to the property in question. (*Covell* v. *Heyman*, 111 U.S. 176, and cases cited; *Rio Grande Railroad Company* v. *Gomila*, 132 U.S. 478; *Central National Bank* v. *Hazard*, 49 Fed. Rep. 293; Opinion of WALLACE, J., Motion Papers, p. 74.)

(5) The DECREE in the United States Circuit Court adjudges that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates amounting in the aggregate to $250,000 of principal thereof, and adjudges the amount due and unpaid thereon. It also provides for proof by the other certificate

holders of their certificates, and the amount due thereon before a master *pro hac vice* named in said decree. (Record, p. 35.)

The JUDGMENT of the New York Supreme Court now brought before this court requires the referee named therein to ascertain, determine, and report from the aforesaid evidence and findings, and such evidence as shall be furnished him, who are the holders of the said certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon said certificates, and directs him to give notice by advertising in two newspapers published in the state of New York, to the holders of certificates, to produce the same before him, and make proof as to their title thereto and the amount due thereon. (Record, p. 115.)

The referee named by the state court is thus authorized upon the evidence and findings in the Sackett suit, "and such other evidence as shall be furnished him," to determine who are the holders of the receiver's certificates and how much is due thereon. No force or effect is given to the decree of the United States Circuit Court. The whole matter is opened and subjected to the determination of the referee appointed by the state court, as if there had never been any determination of the matter in the federal court. (See Assignments of Error 5, 6, Record, p. 545.)

3. The federal questions involved in this case are not settled by the sale under the United States court decree of March 24, 1887, as claimed.

It is true that a sale of the railroad has been made under the United States court decree of March 24, 1897, not-

withstanding the injunction contained in the judgment of November 10, 1891, and that defendant Foster bought the property for $7500 and received a referee's deed therefor. (See deed, Record, pp. 525–527.)

I.

But the sale under the United States court decree has not settled the questions here involved, and the plaintiffs in error are still vitally interested in these questions.

(*a*) The United States court ordered the sale to be made, thus declaring it to be valid.

> WALLACE, J., in *Central Nat. Bank* v. *Stevens*, 49 Fed. Rep. 293.

(*b*) The state court, however, holds that the sale is without force and effect, being in violation of the injunction.

The Court of Appeals say in their opinion in reference to this sale, —

> "The sale under the decree of the United States court was without force and effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar." (Record, p. 535.)

In other words, the state court enjoined the enforcement of the United States court decree, and now a certain action having been taken under the decree which they enjoined, the state court holds this action is without force and effect.

(*c*) The condition of the certificate holders under the decree and the judgment is not changed, therefore, by the

sale, one court holding the sale is good, and the other holding it is without effect.

(*d*) The state court judgment of November 10, 1891, by practically reversing the United States Circuit Court decree of March 24, 1887, irreparably injures the certificate holders.

The gist of the decree of March 24, 1887, lies in the provisions of the decree making defendants Foster and Hazard personally liable for such deficiency in case of any deficiency between the amount realized from the sale of the railroad and the amount of the principal and interest of the receiver's certificates.

Decree, Record, p. 34.

Of course it will appear by a bare inspection of the decree that the right of the complainant to a personal judgment against Hazard and Foster depends upon a valid sale of the premises under that decree, and a deficiency, after the application of the proceeds of sale, to the payment of the certificates.

The judgment of November 10, 1891, of the court in this action, if valid, absolutely deprives the complainant in that suit and the other certificate holders of their right, adjudged by the Circuit Court of the United States, to compel Hazard and Foster to pay this deficiency.

It virtually deprives the certificate holders of the benefit of that decree, and this at the suit of outside parties, who claim not to have been affected in any respect by the decree in the United States Circuit Court.

This judgment attempts to, and, if valid, does practically, so far as any benefit to the parties to the suit in the

United States Circuit Court is concerned, annul and reverse the decree of that court.

(*e*) **Unless the state court judgment of November 10, 1891, is reversed by this court, and the United States court decree of March 24, 1887, sustained, the certificate holders will be further exposed to endless litigation.**

In order to conclusively settle this litigation, which has been pending in various forms, so far as the certificate holders are concerned, for some twelve years or more, the certificate holders have taken the first opportunity of bringing the matter before this court.

The necessity of obtaining a conclusive adjudication by this court of the rights of the certificate holders is shown particularly by the following considerations: —

1. The certificate holders are liable to contempt proceedings before the state court if they try to enforce their rights for deficiency against Foster and Hazard.

That this is no idle fear is shown in that contempt proceedings were instituted in the state court against the certificate holders for suffering the United States court to make the sale under its own decree of March 24, 1887.

These were dismissed because Peter Butler had escaped the jurisdiction of the state court by dying, and the other certificate holders were not shown to have taken any action in the matter.

The Central Bank cannot escape by death, and, if it makes any move under the United States court decree, is liable to contempt proceedings in the state court.

2. Foster has already brought suit in the state

court, based upon the state court judgment of November 10, 1891, to enjoin further proceedings under the United States court decree of March 24, 1887, and to have the same annulled.

It is of the utmost importance, therefore, to the certificate holders that the judgment of November 10, 1891, be reversed and this litigation quieted.

On the other hand, the plaintiffs below have nothing to lose by the reversal of the parts of the judgment of which we complain. Their title as well as ours was sold and conveyed to Foster, and by him to the Lebanon Springs Railroad Company. The only parties interested in maintaining the judgment in its present shape are Foster and Hazard, who are liable for a deficiency under the decree, and who joined in opposing the plaintiffs below.

II.

The New York Supreme Court had no power to enjoin the enforcement of a decree of the United States Circuit Court by judgment or otherwise.

Its judgment, so far as it attempted to enjoin the enforcement of the decree in the United States Circuit Court, is absolutely void and of no effect. The authorities under this head are abundant.

In *McKim* v. *Voorhis*, 7 Cranch, 279, decided in 1812, McKim, a citizen of Maryland, had recovered a judgment in ejectment against Voorhis, a citizen of Kentucky, in the Circuit Court of the United States. Voorhis filed a bill in the Kentucky state court, and obtained an injunction staying all further proceedings on the judgment. The Supreme Court of the United States held that the state

court had no jurisdiction to enjoin a judgment of the Circuit Court of the United States.

In *Riggs* v. *Johnson County*, 6 Wall. 166, the plaintiff had obtained a judgment in the United States Circuit Court for the District of Iowa, and issued execution, which was returned unsatisfied. After the return of the execution, an Iowa state court granted an injunction perpetually enjoining the county officers from levying a tax to pay the judgment. Notwithstanding this injunction, the plaintiff applied to the United States Circuit Court for a mandamus to the county commissioners to compel them to levy a tax sufficient to pay the judgment. The commissioners answered, making as a return the injunction previously laid on them by the state court. The plaintiff demurred to the answer, assigning four causes of demurrer, the substance of the one chiefly relied on being that, after the judgment was rendered in the Circuit Court, the state court had no jurisdiction, power, or authority to prevent him from using the process of this court by mandamus to collect his judgment. The Circuit Court overruled the demurrer, and a judgment was given for the commissioners; but this court on error held that the demurrer should have been sustained, and that the state court had no jurisdiction to grant the injunction. The subject was very fully discussed by Mr. Justice CLIFFORD, who wrote the opinion in the case. It is stated by him that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue the proper process to enforce such judgment or decree" (p. 187).

It is expressly determined "that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied" (p. 187).

"Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution" (p. 187).

Again, it is held in the same case, —

> "Authority of the circuit courts to issue process of any kind which is necessary to exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the state courts or by any act of a state legislature" (p. 194).

Again, it is said, —

> "State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts.
>
> "Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action circuit courts are wholly independent of the state tribunals (pp. 195, 196).

"This principle has ever since been maintained in this court. *United States* v. *Council of Keokuk*, 6 Wall. 514; *Mayor* v. *Lord*, 9 Wall. 409; *Supervisors* v. *Durant*, 9 Wall. 415; *Amy* v. *Supervisors*, 11 Wall. 136.

In the case of *Mayor* v. *Lord*, *supra*, it is said by Mr. Justice SWAYNE, —

"It is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration in other cases presenting the same question" (p. 414).

In *Amy* v. *Supervisors*, *supra*, Mr. Justice SWAYNE says, —

"The two sets of tribunals — state and national — are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees." (11 Wall. 138.)

In *Rio Grande R.R. Co.* v. *Gomila*, 132 U.S. 478, it is said that —

"the jurisdiction of a court of the United States once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court" (p. 481).

This question has been decided in accordance with the contention of the plaintiffs in error by the Circuit Court of the United States for the Northern District of New York, with reference to the injunction granted by the judgment in this very action.

See *Central Nat. Bank* v. *Hazard*, 49 Fed. Rep. 293, in which Judge WALLACE, in his opinion, uses the following language: —

> "No federal court has ever recognized the authority of a state court to enjoin its proceedings or to enjoin parties from proceeding in a suit in which the federal court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the federal courts." (Citing the cases above referred to.) (P. 295.)
>
> . . . . . .
>
> "In the present case, after the decree was made by this court ordering the property to be sold by its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the state court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett suit. As was said in *Barrow* v. *Hunton*, 99 U.S. 80, —

"'If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; . . . a new case arising upon new facts, although having relation to the validity of an actual judgment or decree.'

"The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody, continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a state court. (*Railroad Co.* v. *Gomila*, 132 U.S. 478.) (P. 296.) (See Motion Papers, pp. 77–79, fols. 278–284.)"

These decisions of this court that an interference by injunction by the state courts with proceedings in the courts of the United States will not be tolerated, have recently been repeated and emphasized in the case of *Moran* v. *Sturges*, 154 U.S. 256, reversing the judgment of the New York Court of Appeals in the case, *Matter of the Schuyler Steam Tow Boat Co.*, 136 N.Y. 169. The reasoning of this court in that case is entirely inconsistent with the contention of the defendants in error that the state court has power virtually to annul a decree of the federal court by enjoining the parties in whose favor it is rendered from taking the proper steps to enforce the decree.

III.

The court below had no right to inquire into the merits of the case, which was decided by the Circuit Court of the United States.

The following language of this court, used in reference to a judgment of the United States Circuit Court, well states a plain and well-settled proposition in regard to the effect of judgments or decrees of courts of competent jurisdiction: —

> "Their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity and its effect are complete in all respects between all parties in every suit, and in every form where it is legitimately produced as the foundation of an action, or of a defense, either by plea or proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate. (*Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U.S. 141, 157, 158. See, also, *Covell* v. *Heyman*, 111 U.S. 176.)"

This case should not be confounded with those in which something has arisen since the rendition of the judgment to render its enforcement inequitable, as where the judgment of the federal court or of a sister state has been reversed upon appeal, or where it has since been paid or collected. (See High on Injunctions, sec. 269.)

The courts below seem to have thought that the rendition of the judgment in this case brings it within the doctrine above stated (see Opinions of Judge BARTLETT, Record, p. 535, and of Mr. Justice PUTNAM, Motion Papers, pp. 69, 70); but the "something" which must arise after the rendition of the judgment, in order to authorize a state court to prohibit its enforcement, must be a reversal or payment, or something of that kind. The judgment in this case depends entirely upon facts which existed before the decree in the United States Circuit Court was rendered, and it does not, as the learned justice states, "avoid" the certificates.

See opinion of Mr. Justice PUTNAM denying motion to strike out the clause in the judgment enjoining appellants from enforcing the judgment by a sale of the premises. (Motion Papers, pp. 69, 70, fols. 255, 256; also 69 Hun, 460.)

It certainly does not and could not pronounce void the agreement by which Foster and Hazard agreed to pay the certificates, which was adjudged by the United States Circuit Court to make them binding upon all the parties to the suit in that court.

Nor should the case be confounded with cases like *Barry* v. *Brune*, 71 N.Y. 262, where two parties claimed the same fund, and one brought a suit in the federal court without making the other a party, in which case a bill of interpleader was brought in this state, in which both parties claimant were made defendants as well as the judgment debtor, the insurance company; and it was held that a judgment might be entered restraining the collection of so much of the judgment in the United States Circuit Court as was held to be payable to the other claimant. This case would be analogous to that if there was some party claim-

ing to own the receiver's certificates other than the complainant and the other parties in the United States Circuit Court. But there is no question here that, if anybody was entitled to recover upon the certificates, it was the parties who prevailed in the United States Circuit Court. Neither the complaint nor the proofs in this case show any *facts* arising since the decree of the United States Circuit Court impairing the obligation of the defendants in that suit to pay as therein adjudged.

IV.

The other questions in the case have been considered in detail under sections 2, 3, 4, and 7 in the brief filed by Messrs. Hale and Hyde in this case.

V. The portions of the judgment referred to in the assignment of errors, namely, the part thereof perpetually enjoining and restraining the certificate holders from proceeding in any court whatever to enforce any lien upon or for the sale of the premises, and from suffering any such action or proceeding to be brought or prosecuted in their names; the portion thereof perpetually enjoining and restraining said certificate holders from proceeding with the sale under the decree, and from suffering said sale to proceed in their or any of their names or behalf; and all portions of the judgment which in any way interfere with, or reverse or nullify or set aside in whole or in part, the decree of the United States Circuit Court above referred to, should be reversed, and the cause remanded to the state court with directions to strike out such reversed portions of the judgment from the judgment, and to take

such further proceedings in conformity with the rights of the plaintiffs in error as established by the decree of the United States Circuit Court, as may be just and proper. Costs should be awarded to the plaintiffs in error against those defendants in error who were plaintiffs below.

W. S. B. HOPKINS,
WM. A. SARGENT,
Attorneys and of Counsel for the CENTRAL NATIONAL BANK, *Plaintiff in Error.*

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 38.

THE CENTRAL NATIONAL BANK OF BOSTON and others (holders of certificates issued by John W. Van Valkenburgh as Receiver of the Lebanon Springs Railroad Company,
Plaintiffs in error.

against

AARON R. STEVENS and others,
Defendants in error.

SUPPLEMENTAL BRIEF FOR THE CENTRAL NATIONAL BANK,

PLAINIFFS IN ERROR.

EVEN IF IT SHOULD BE CONCEDED—AND IT IS NOT SO CONCEDED—THAT THE STATE COURT HAD JURISDICTION TO ANNUL THE DECREE OF THE FEDERAL CIRCUIT COURT, THE CASE AS PRESENTED DID NOT JUSTIFY THE JUDGMENT AS RENDERED.

The Court of Appeals in its opinion in this case, relied upon the cases of Dupasseur v. Rocereau, 21 Wall. 130, 135, and Crescent City Live Stock Co. v. Butchers' Union, 120 U. S. 141-147, as authorities for its position, that where the jurisdiction of a Circuit Court of the United States depends upon the residence of the parties, "all that can be "claimed for the decree of the latter court is that "it be accorded the same force and effect as a simi- "lar judgment of the Supreme Court of New "York."

What this court said was (120 U. S. 147): "It "may be conceded that the judgments and decrees "of the Circuit Court of the United States, sitting "in a particular State, in the courts of that "State, are to be accorded such effect, and "such effect only, as would be accorded in "similar circumstances to the judgments and "decrees of a State tribunal of equal authority. "*But it is within the jurisdiction of this court, to de- "termine in this case, whether such due effect has been "given by the Supreme Court of Louisiana to the de- "crees of the Circuit Court of the United States here "drawn in question.*"

This court, under this decision, may, therefore, determine in this case, whether due effect has been given by the New York courts to the decree of the Circuit Court of the United States.

Clearly, such due effect has not been given.

First. The action was not brought within the time limited by the practice of the courts for the filing of a bill of review, or a bill in the nature of a bill of review, or a bill to impeach a decree for fraud.

"A bill of review for errors apparent upon the "face of the record will not lie after the time with- "in which a writ of error could be brought; for "courts of error govern themselves in this particu- "lar by the analogy of the common law in regard "to writs of error."

Taylor v. Charter Oak Life Ins. Co., 17 Fed. Rep. 566, citing Story Eq. Pl. sec. 410.

Thomas v. Harvies' Heirs, 10 Wheat. 146.

Ricker v. Powell, 100 U. S. 109.

Pacific R. Co. v. Mo. Pac. Ry. Co., 2 McCrary, 228.

In the State of New York writs of error are abolished.

Code of Civil Procedure, sec. 1293.

Bills for review have no place for errors appearing upon the face of the record. The only remedy is by appeal. Motions for new trials upon the ground of newly discovered evidence, or new actions to review for fraud, are not, in civil actions, regulated by statute. In all such cases, the party

volved in them. He was not a stockholder, bondholder, certificate holder or *cestui que trust.*

"It was admitted that the plaintiff, Stevens, "had no bonds which were acquired by him earlier "than November, 1886.'' (Record, p. 439.) It is a fair inference from the testimony of his counsel that the bonds were put into his hands merely to qualify him to be a plaintiff in this action. As to some of the plaintiffs there is no proof they are better situated than he. (Pp. 465, 466.)

One other seems to have been the owner before the time of the first foreclosure. (P. 93.) That is the plaintiff Rogers, who had bonds to the amount of one thousand dollars. It does not appear, however, that he was at any time a party to the action, prior to the issue of the fifth amended summons, which bears date the eighth day of December, 1890. (P. 3.) This was more than five years after the entry of judgment in the Sackett suit, and more than seventeen years after the sale under foreclosure of the first mortgage.

It is claimed and insisted that the Stevens' suit at this late day, could not be bolstered up and strengthened, by bringing in parties whose right to maintain an action, such as he sought to maintain, had been lost by lapse of time.

At the time Stevens acquired his bonds, the mortgage given to secure payment of these bonds had been foreclosed, and the road sold. The in-

debtedness created by the bonds had been merged in judgment. The bonds themselves had no existence, except as leaves of ancient history.

The Sackett suit had run its course. In that suit receiver's certificates had been issued, sold and confirmed. Judgment had been entered affirming the validity of the certificates. The road had been sold subject to the lien of the certificates. The purchasers had assumed and agreed to pay the certificates. If by these various steps and proceedings any one had been wronged, it was not Stevens. If Sackett had been acting in his own interest, instead of for the interests he pretended to seek to protect, Stevens suffered nothing thereby. If the receiver were uncalled for, or his certificates were improperly or improvidently ordered to be issued, it mattered not to Stevens.

Afterwards, when the present plaintiffs in error sought relief in court, because their certificates were not paid, Stevens had no concern in their proceedings. If the history of their proceedings aroused a chivalric feeling in his breast and inspired him to champion the cause of those who had been original bondholders, he could not arm himself for the contest by the mere posession of a few bonds which long before had been merged in the judgment of foreclosure and sale.

Even if the right to file a bill of review, or a bill to avoid a decree because of fraud be assignable, of

which there must be considerable doubt, such a right was not an inherent or appendage part of the dead bonds. It was not negotiable by mere delivery of the bonds. It could only have been transferred by some solemn instrument evidencing the intent to make that transfer.

Stevens gained no right to maintain his action by becoming owner of the bonds he holds.

So far from his having secured for himself an impregnable position, he has no standing at all.

He appears upon the record as a mere volunteer, invoking the judgment of the New York State court to restrain the Circuit Court of the United States from rendering a decree in a matter wherein it had undoubted jurisdiction of the parties and subject matter of the controversy. He has no rights which have been invaded. Merely to oblige his friend and patron, the counsel of many interests in this protracted controversy, he has voluntarily assumed the role of sufferer for hurts to others. He has no wrongs of his own to be redressed, and his procurement of bonds already merged in judgment gives him no claim to the protection of a court of chancery.

The other plaintiffs have no greater rights than he and their rights, if any, are barred by lapse of time.

Third. The proceedings in the Sackett suit authorizing the issuing of the receiver's certificates,

were proceedings *in rem*, and binding upon all the world.

Sackett claimed an equity in the road. The road was in the hands of Root, whom every one seems to characterize as a trespasser. Sackett had a right to invoke the aid of a court of competent jurisdiction to take the road out of the hands of the trespasser. The court did take possession of the road, and its receiver was put in possession. The possession was that of the court, and not of the plaintiff in the suit.

The court having the road in its possession, had jurisdiction to protect and preserve it. Its acts in holding possession and preserving the property, were proceedings *in rem*. The court had authority and jurisdiction to direct its receiver to borrow money to preserve the property. The receiver's certificates were issued under due authority, and when negotiated were valid as against all the world.

The case is analogous to that of a derelict upon the ocean. If brought into a court of admirality, that court could award salvage, no matter who might in fact be the owner. It could award payment for preserving the property. In this case the receiver's certificates were issued to pay for preserving the property. The road had been stripped of rolling stock and supplies. It was in process of decay. It was in the hands of the court,

and no question of parties could disturb the authority of the court to preserve the property.

Root was found in possession, and had the action been in ejectment, he would have been the only necessary party defendant. Sackett had an equity which is not even now questioned, and his suit was a due, proper and sufficient proceeding to confer upon the court jurisdiction to take the road into its possession. Having possession, it had power and authority to protect the road. Its acts in protecting the propery were unqualifiedly proceedings *in rem*.

There can be no question as to the general proposition of law, as a matter laid down in the text books, and as a principle sustained by the courts that administer justice under the common law and under the civil law, that a decree *in rem*, is conclusive as to all parties, and binding upon the whole world, and it is insisted that that principle of law can be invoked in the present case.

The principal cases which have arisen, and in which it has been established that judgments *in rem* are conclusive upon the whole world, are cases in admiralty, of seizure and forfeiture. Questions in such cases have arisen in England and America, under the common law, and in France under the civil law, and the result has been at all times the same.

The decision has uniformly been that a judgment *in rem*, in the admiralty courts, is, as is claimed

here, conclusive upon all parties against saying that the status of the thing adjudicated upon was not such as declared by the adjudication.

The universal effect of a judgment *in rem*, depends upon this principle, viz.: that it is a solemn declaration proceeding from an accredited quarter, concerning the status of the thing adjudicated upon, which very declaration operates accordingly upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.

In Smith's ading Cases, the case of Trevivan v. Lawrence (alk. 276), is reported with a very full note, which includes the subject at present under consideration. There the result seems to be arrived at that where a judgment *in rem* has been pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose, such an adjudication, being a most solemn declaration from the proper and accredited quarter, that the status of the thing adjudicated is as declared, it concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication.

It follows that if our contention be well founded that the court had *jurisdiction* to order the issuing of the receiver's certificates, their validity cannot be anywhere questioned.

Fourth. It is stated in the brief of the learned counsel for the defendants in error (P. 33): "No-"body is questioning the soundness of the decree in "the United States Court. It was unquestionably "right. The jugment in this action necessarily as-"sumes that it was right."

Nevertheless, it is claimed that the State Court had a right to prevent the enforcement of this decree, which was "unquestionably right." That decree established the lien of the receiver's certificates, and adjudged their validity. This suit, commenced after the decree in the Circuit Court had been pronounced, assailed the validity of the cause of action, which had become merged in that decree. The claim is, that it swept away the foundation of that suit. But it was too late to do this after judgment. The decree of the Circuit Court could not be successfully assailed, because no charge was made against it, and it was conceded to be "unquestionably right." If "unquestionably right" the court ought not to have rendered any judgment which should absolutely annul it. This is what the State court has done.

Fifth. The State court has also vacated the sale under the original foreclosure in the suit of the Union Trust Co. against the Lebanon Springs Railroad, which took place in January, 1873. (P. 110.) This is upon the ground that the pur-

chasers at the foreclosure sales did not pay the purchase money. The regularity of the sale was not assailed in any way, and it appears from the testimony of Mr. Duncan that the purchase money was paid by a check, at the time of the sale, for $100,000, which check was received by the plaintiff in the foreclosure case, and was good at all times down to the 27th of July, 1875. (P. 452.) It is possible that this question of fact is not open for review in this court, because of there having been no assignment of error with respect to this particular finding of the State court. It is believed, however, that it is a matter worthy of consideration in connection with the claim made for the defendants in error, that the court has swept away the source of title to the cause of action upon which was rendered the decree in favor of the plaintiffs in error in the Circuit Court of the United States.

Sixth. It is facetiously said by Mr. Judge Bradley, in rendering the opinion of the Court of Appeals, that "the setting aside of the judgment in "the Sackett suit, upon which the suit in the United "States Circuit Court was founded, for fraud, estab- "lished a new fact occurring since the decree in that "court, which gave jurisdiction in this action to en- "join proceeding thereon." (Record, pp. 535-536.)

We say "facetiously said," for the learned judge must have recognized the fact that the decree in

the Sackett suit had not been set aside at the time of the rendition of the judgment in the Stevens suit. It was the judgment in the Stevens suit which set aside the judgment in the Sackett suit. It was the same judgment which restrained the plaintiffs in error from enforcing the decree of the Circuit Court. Priority in point of time did not exist. All the priority that could be claimed for the setting aside of the Sackett judgment before the enjoining the enforcement of the decree of the Circuit Court, arose from the fact that the part of the judgment which set aside the judgment in the Sackett suit was only a page of that judgment preceding the page upon which was written the part of the judgment in which a decree of the Circuit Court was enjoined.

COUNSEL FOR THE DEFENDANTS IN ERROR HAS FILED A SUPPLEMENTAL BRIEF, CALLING ATTENTION TO CASES RECENTLY ADJUDGED BY THIS COURT. IT IS RESPECTFULLY SUBMITTED THAT EACH AND ALL OF THESE CASES FULLY SUSTAIN THE POSITION OF THE PLAINTIFFS IN ERTOR, AND CALL FOR A REVERSAL OF THE JUDGMENT BELOW.

Moran v. Sturges, 154 U. S. 256.
Shields v. Coleman, 157 U. S. 168.
In re Chetwood, 165 U. S. 443.
In re Johnson, 167 U. S. 120.

The case of Moran v. Sturges, was a case in which proceedings had been taken in the Supreme Court of the State of New York seeking relief which involved the appointment of a receiver. A receiver was appointed by the court on the 31st day of July, 1891, but the receiver did not file his official bond and enter upon the discharge of his duties before the 4th day of August. On the first and third days of August, vessels belonging to the defendant in the action in the State court, were seized by United States marshals, under libels in admiralty filed in the proper District Courts. When the receiver thereafter went to take possession of the vessels, he found them in the custody of the marshal. The State court issued process to enjoin further proceedings on the libels in the District Court in the United States. This ruling was affirmed by the Court of Appeals, but the decision of the State court was reversed when brought before this court by writ of error.

The decision of this court appears to have been upon two grounds. First, that the United States court had acquired actual possession of the vessels before the State court had acquired jurisdiction over them, and, second, that the proceeding in the United States court was a proceeding in admiralty, and that the cognizance of admiralty causes by the Disrict Courts of the United States is exclusive

Mr. Chief Justice Fuller, in his opinion, states

this general rule, which was concurred in by all the members of the court, though two justices dissent from the judgment (p. 274): "It is a rule of "general application, that where property is in the "actual possession of one court of competent jurisdic "tion, such possession cannot be disturbed by pro- "cess out of another court."

In the case now before the court, the Circuit Court of the United States, by virtue of its decree, that the receiver's certificates had become a lien upon the property, and that the property should be sold for the satisfaction of that lien, had become possessed of the property in question. The subsequent proceeding in this case in the State court to restrain the execution of that decree, was a proceeding that was taken in direct violation of the principle of law above announced. The judgment rendered in the State court was likewise in violation of that principle. Under the authority claimed by the defendants in error, for a court to restrain proceedings in any other court, it might have been competent for the Circuit Court of the United States to have restrained the State court from proceeding to interfere with its judgment. But the recognition of the right to such an injunction cannot be construed in any way as authority generally to issue an injunction to restrain the proceeding of one court of competent jurisdiction, where another court, in an action commenced sub-

sequent to the decree in the court that has first jurisdiction, undertakes to stay proceedings upon the first judgment, for the sake of rendering is own judgment effectual.

In Moran v. Sturges, the chief justice cited the case of Dietzsch v. Huidekoper, 103 U. S. 494, and the counsel relies upon an expression in the opinion of Mr. Justice Woods in that case, as favorable to himself.

In the case last mentioned, an action of replevin had been commenced in a State court of Illinois. This action had been properly removed into the proper Circuit Court of the United States, but notwithstanding such removal, the plaintiffs had proceeded in the State court to carry on their action to judgment. Afterwards, in the State court an action of debt had been commenced on the replevin bond given in the State court, and the defendants filed their bill in the United States Circuit Court, asking an injunction to restrain the parties in the State court from prosecuting their suit upon the replevin bond. The Circuit Court granted the injunction, and after the preliminary injunction had become absolute and perpetual, the case was brought before this court.

The only question for decision here was, could the court below enjoin the appellants from proceeding in the action at law brought by them on the replevin bond in the Circuitt Court for Cook

county? This court held that it could, because the judgment in the State court had been rendered after the removal of the cause to the United States Circuit Court, and after the State court had lost all jurisdiction over the case. The appeal in the case before this court was held to be in substance a proceeding in the Federal Court to enforce its own judgment.

Because this court held that the relief was merely ancillary to the jurisdiction acquired, and necessary to give effect to its own judgment, the learned counsel seems to argue that the injunction in the State court here was ancillary to some jurisdiction which it had acquired over the property in question, when jurisdiction over that property was already vested in the Circuit Court of the United States by a decree rendered before this suit was commenced.

He further claims that in this case jurisdiction is not concurrent, but that the State court had an exclusive jurisdiction of the cause of action involved in the case.

It would seem as if it were unimportant to consider whether or not the jurisdiction was concurrent or not, because the fact is, that the Circuit Court had actual and exclusive possession of the *rem*, and had undoubted and unquestioned jurisdiction to render the decree which it had rendered. After that decree it was impossible that the State court

should have exclusive jurisdiction of a cause of action, which required the annulment of that decree.

In Shields v. Coleman, an order was made in the United States Circuit Court, appointing a receiver of the property of a railroad company. The receiver took possession, and two days after surrendered possession upon a bond being given for whatever sum might be decreed in favor of the plaintiff. Thereafter a bill was filed in the State Chancery Court of Tennessee, on behalf of sundry creditors of the railroad company, and other judgment creditors, seeking to reach the property of the company. A fiat was issued from the Chancery Court appointing a receiver, who immediately took possession of the railroad property, and commenced the operation of the road. Thereafter a receiver was appointed in the suit previously commenced in the Circuit Court of the United States, and the Circuit Court gave its receiver possession of the property, to the exclusion of the receiver already in possession, under the fiat of the State Court of Chancery.

This court held that the United States court had not power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a State court, and that it could not rightfully take the property out of the hands of the receiver so appointed by the State court.

The learned counsel for the defendants in error

seems to consider that it is a question of importance in that case, that the suit in the Federal Court was begun first. But this court does not appear to have considered that as a question of any importance. The court said, per Mr. Justice Brewer (pp. 178-179):

"When that court thereafter accepted a bond in "lieu of the property, discharged the receiver, and "ordered him to turn over the property to the rail-"road, and such surrender was made in obedience "to this order, the property then became free for "the action of any other court of competent jurisdic-"tion. It will never do to hold that after a court "accepting security in lieu of the property, has "vacated the order which it has once made appoint-"ing a receiver, and turned property back to the "original owner, the mere continuance of the suit "operates to prevent any other court from toch-"ing that property."

The difference between that case and the present one is radical. The Circuit Court of the United States, after having acquired jurisdiction, never has surrendered that jurisdiction. It has never left the property in question "free for the action of any other court of competent jurisdiction."

In re Chetwood was an original petition filed in this court, for the vacating of or prohibition upon certain orders of the Circuit Court of the United

States for the Northern District of New York, enjoining Chetwood from prosecuting a writ of error from this court in the name of the California National Bank of San Francisco, as plaintiff in error, and directing him to dismiss a second writ of error from this court, and to punish him for contempt of the Circuit Court in suing out writs of error. Leave was granted to file the petition, and a rule to show cause was entered, to which return was made.

It appeared that the comptroller of the currency had appointed a receiver of the California National Bank of San Francisco. Afterwards, the petitioner had begun a suit in a State court against certain officers and trustees of the bank, and the receiver, seeking to make the trustees and directors accountable for breaches of trust, &c. The petitioner had judgment. Thereafter, pursuant to the provisions of the statutes, the receiver was discontinued, and an agent of the bank was appointed to succeed him in the settlement of its affairs. This agent intervened in the pending action of the petitioner in the State court, and secured a direction in his behalf, that the recovery in favor of the petitioner was for the benefit of the agent, and the money recovered should be paid over to him. While the case was on appeal in the Supreme Court of California, and undetermined, the agent filed an original bill in the Circuit Court of the United States, alleging that

as such agent he was an officer of the United States, and had sole power to act for the bank and its shareholders, to the exclusion of the stockholders, directors and officers thereof. He claimed in his prayer for judgment, to be exclusively entitled to have and receive into his custody all the moneys and property of the bank, and to collect the outstanding indebtedness, whether evidenced by open accounts or judgments of record, and asked, amongst other things, that the petitioner be restrained from denying his right to the exclusive control of the assets of the bank, and from commencing further litigation, or defending any action theretofore brought.

The Circuit Court made an order that the petitioner be restrained from commencing any further litigation or suits, but not enjoining him from prosecuting or defending to final determination any actions then pending in the Supreme Court of the State of California, or in the Circuit Court. Thereafter the Circuit Court made an order to punish the petitioner for contempt of court, in suing out writs of error to this court, and in other matters.

Amongst other things decided in the case was, that the receiver appointed by the comptroller of the currency, and the agent appointed to succeed the receiver, were not officers of the court.

It was further held (p. 459): "The suit was "properly brought in the State court, proceeded to

"judgment, and was carried to the Supreme Court "of California on appeal. These courts undeni- "ably had jurisdiction over the suit and the parties."

Thereafter, Mr. Chief Justice Fuller said, as quoted by the counsel for the defendants in error (p. 460): "The doctrine is firmly established, that "where the jurisdiction of a court and the right of "the plaintiff to prosecute his suit in it have once "attached, that right cannot be arrested or taken "away by proceedings in another court," and that where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction.

To apply these principles to the present case, it is sufficient to say, that it is conceded that the plaintiffs in error properly brought their suit, and proceded to judgment in the Circuit Court of the United States, and that that court undeniably had jurisdiction over the suit and the parties. Their right to prosecute the suit having once attached, that right could not be arrested or taken away by proceedings in the State court. The railroad property having come actually into possession of the Circuit Court, being a court of competent jurisdiction, by virtue of the decree which it had made, that such property should be sold under the direction of the court, its possession could not be dis-

turbed by process out of the State court, whether that court be considered one of concurrent jurisdiction or not.

In re Johnson was a criminal case. The question in this case was as to whether jurisdiction to try the offense charged against the petitioner rested in the United States court for the Southern District of the Indian Territory, or in the court for the Eastern District of Texas. Mr. Justice Brown, giving the opinion of the court, says:

"If the United States court for the Eastern Dis-"trict of Texas had 'acquired jurisdiction' of this "case, manifestly it was entitled to try the peti-"tioner, but otherwise not."

Jurisdiction was held to be vested in the United States court in the Indian Territory of all offenses in that Territory of which the Texas court had not acquired jurisdiction before the first of September, 1896.

The question of the right to try the petitioner was made to turn upon the question as to which of the two courts had by actual arrest of the defendant first acquired jurisdiction over him, and in the course of the decision, Mr. Justice Brown used the language quoted by the learned counsel for the defendants in error, which make most emphatically for the plaintiffs in error.

The case of Marshall v. Holmes, 141 U. S. 589,

is not in conflict with any of these cases. In that case, one of the defendants in error had obtained several judgments in the courts of Louisiana against the plaintiff in error. She filed her petition in a District Court of Louisiana, asking an injunction restraining the collection of these judgments, upon her allegation that they were all obtained on false testimony, and forged documents, and that equity and good conscience required that they be annulled and avoided. Thereafter, she filed her petition for removal of her suit into the Circuit Court of the United States, upon the grounds that she was a citizen of New York, and the defendants citizens of Mississippi and Louisiana.

The court made an order refusing the application for removal. Upon the trial of the case, judgment was rendered dissolving the injunction, and authorizing the judgment creditor to execute the judgments enjoined. An appeal to the Court of Appeals for the Second Circuit of the State of Louisiana was prosecuted, and with some modification the judgment was affirmed. From that judgment Mrs. Marshall prosecuted the present writ of error. This court held that upon filing the petition for removal to the United States court, the State court was without authority to proceed further, if the suit in its nature were one of which the Circuit Court of the United States could rightfully take jurisdiction. It was then held that if the

circumstances were such as would authorize relief by a Federal Court, if the judgment had been rendered by it, and not by a State court, the Circuit Court had a right to deprive the party of the benefit of the judgments previously obtained in the State court.

To apply the authority of that case to the present case, it might be said that if the Circuit Court of the United States had by reason of citizenship of the different parties been able to acquire jurisdiction, and had acquired jurisdiction of the Stevens suit, it might have rendered the same judgment in the Stevens suit that the State court could have rendered in it, in so far as the relief sought consisted in setting side the Sackett judgment for fraud. But without any pretense or averment that there was fraud in obtaining the decree in favor of the plaintiffs in error in the Circuit Court of the United States, that decree cannot be annulled, merely because the State court might have had authority to set side the judgment in the Sackett suit. Before the Stevens suit was commenced, rights of parties had been fully adjudicated in the Circuit Court of the United States, and in order to give effect to that decree, it seems to be imperative that the judgment now brought before this court should be absolutely reversed. At least, it should be reversed to the extent of leaving the decree of the

Circuit Court in full force, and unaffected as an adjudication of the rights of the parties properly before the court.

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